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Wong Tzy Jian v Wong Keh Yen & Ors

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HIGH COURT (KUALA LUMPUR) — WRIT SUMMONS NO WA-22NCC-367–06 OF 2024
MOHD ARIEF EMRAN J
30 SEPTEMBER 2024

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Civil Procedure — Injunction — Interlocutory injunction — Plaintiff applied for interlocutory injunction against defendants and sought monies utilised by first defendant be returned to second defendant — Whether court could stay or restrain order of another High Court — Whether wrongdoing must be undertaken through derivative action — Whether orders sought was justified

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The first defendant was the registered shareholder of all the shares held in the second defendant and was its sole director. She was also the executor of the estate of the late mother of the plaintiff and the first defendant. The plaintiff claimed that the shares registered in the name of the first defendant in the second defendant were shares held on trust and were beneficially owned by him. The plaintiff also alleged that he had caused the sum of SGD33,362,650 to the second defendant, which was allegedly then paid as a loan to the fourth defendant. The third defendant was appointed as the sole agent to control the accounts of the fourth defendant pursuant to an order of court pertaining to a judicial management order of the High Court. The fourth defendant was placed under judicial management in the same proceedings. The plaintiff contended that: (a) the first defendant had caused the monies held by the second defendant to be utilised for unauthorised purposes and that as a result, the first defendant did breach her duties owed to him and to the second defendant as the sole director of the company; and (b) the assets of the second defendant and the proceeds of the receipts of monies from the fourth defendant were utilised by the first defendant for unauthorised purposes including to preserve and to protect their late mother's estate. Hence, this application by the plaintiff seeking interlocutory injunction against the defendants. The reliefs sought by the plaintiff against the first defendant related to the affairs of the second defendant where he sought that all monies utilised by the first defendant be returned to the company.

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Held, dismissing the application:

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(1) The plaintiff was only seeking to stay or restrain the implementation of the order of the High Court that had allowed for the payment of monies from the fourth defendant to all of its creditors including the second defendant. The order to restrain such payments could not be granted as

that should only be undertaken before the court that had granted such orders. To allow the prayers sought by the plaintiff against the third and fourth defendants would cause the court to interfere with the exercise of the powers by another High Court judge. The attempt to interfere with the implication of the said order could not be entertained as the said order remained enforceable and should be respected (see paras 14–15 & 17).

(2) Whether the shares in the second defendant belonged to the plaintiff as claimed or otherwise was an issue that would only be determined after hearing of the merits of the claim. At best the plaintiff's claim of the alleged wrongs against the first defendant related to the wrong utilisation of the monies received by the second defendant from the fourth defendant. The plaintiff did not have a direct right to the said monies as the said sums belonged to the second defendant. The alleged wrong utilisation of the said sums by the first defendant, at best, pointed to a possible claim of breach of fiduciary duties owed by the first defendant to the second defendant. The plaintiff did not have a right to institute a claim on behalf of the second defendant unless leave of court was obtained under ss 347 to 350 of the Companies Act 2016. However, the plaintiff did not seek leave of court to institute proceedings on behalf of the second defendant for the alleged wrongs committed against the company. Therefore, the prayers sought against the defendant should not be acceded (see paras 18–20 & 29).

(3) The orders sought only related to the payment of monies by the second defendant in accordance with the directions of the first defendant. The said claim was mainly and primarily monetarily and was only to secure the monies that would be received by the second defendant from the fourth defendant. In the circumstances, a restraining order with the intention to securitise the said sums could not be entertained by the court. Impecuniosity of the defendants was not grounds justifying the orders sought. The plaintiff had not shown that there were exceptional circumstances justifying the orders sought even if damages were adequate (see paras 30–32, 34 & 36).

[Bahasa Malaysia summary

Defendan pertama adalah pemegang saham berdaftar bagi semua saham yang dipegang dalam defendan kedua dan merupakan pengarah tunggalnya. Beliau juga merupakan pelaksana harta pusaka mendiang ibu plaintif dan defendan pertama. Plaintif mendakwa bahawa saham yang didaftarkan atas nama defendan pertama dalam defendan kedua adalah saham yang dipegang dalam amanah dan dimiliki secara benefisial olehnya. Plaintif juga mendakwa bahawa beliau telah menyebabkan sejumlah SGD33,362,650 kepada defendan kedua, yang didakwa kemudiannya dibayar sebagai pinjaman kepada defendan keempat. Defendan ketiga dilantik sebagai ejen tunggal untuk mengawal

akaun defendan keempat selaras dengan perintah mahkamah berhubung dengan perintah pengurusan kehakiman Mahkamah Tinggi. Defendan keempat telah diletakkan di bawah pengurusan kehakiman dalam prosiding yang sama. Plaintif berhujah bahawa: (a) defendan pertama telah menyebabkan wang yang dipegang oleh defendan kedua digunakan untuk tujuan yang tidak dibenarkan dan bahawa akibatnya, defendan pertama telah melanggar kewajipannya terhadapnya dan defendan kedua sebagai pengarah tunggal syarikat; dan (b) aset defendan kedua dan hasil daripada penerimaan wang dari defendan keempat telah digunakan oleh defendan pertama untuk tujuan yang tidak dibenarkan termasuk untuk memelihara dan melindungi harta pusaka ibu mereka yang telah meninggal dunia. Oleh itu, permohonan ini oleh plaintif yang memohon injunksi interlokutori terhadap defendan. Relief yang dipohon oleh plaintif terhadap defendan pertama berkaitan dengan hal ehwal defendan kedua di mana beliau meminta agar semua wang yang digunakan oleh defendan pertama dikembalikan kepada syarikat.

Diputuskan, menolak permohonan:

(1) Plaintif hanya memohon untuk menangguhkan atau menghalang pelaksanaan perintah Mahkamah Tinggi yang membenarkan pembayaran wang daripada defendan keempat kepada semua pemiutang termasuk defendan kedua. Perintah untuk menghalang pembayaran sedemikian tidak boleh diberikan kerana ia hanya boleh dilakukan di hadapan mahkamah yang telah mengeluarkan perintah tersebut. Membenarkan permohonan yang dibuat oleh plaintif terhadap defendan ketiga dan keempat akan menyebabkan mahkamah campur tangan dalam pelaksanaan kuasa oleh hakim Mahkamah Tinggi yang lain. Percubaan untuk campur tangan dengan pelaksanaan perintah tersebut tidak dapat diterima kerana perintah tersebut masih boleh dikuatkuasakan dan harus dihormati (lihat perenggan 14–15 & 17).

(2) Sama ada saham dalam defendan kedua adalah milik plaintif seperti yang didakwa atau sebaliknya adalah isu yang hanya akan ditentukan selepas mendengar merit tuntutan. Pada dasarnya, tuntutan plaintif terhadap kesalahan yang didakwa terhadap defendan pertama berkaitan dengan penggunaan wang yang salah yang diterima oleh defendan kedua dari defendan keempat. Plaintif tidak mempunyai hak langsung terhadap wang tersebut kerana jumlah tersebut adalah milik defendan kedua. Penggunaan wang yang didakwa secara tidak betul oleh defendan pertama, pada tahap terbaik, menunjukkan kemungkinan tuntutan pelanggaran tanggungjawab fidusiari yang dipikul oleh defendan pertama terhadap defendan kedua. Plaintif tidak mempunyai hak untuk memulakan tuntutan bagi pihak defendan kedua melainkan kebenaran mahkamah diperoleh di bawah ss 347 hingga 350 Akta Syarikat 2016. Namun, plaintif tidak memohon kebenaran mahkamah untuk memulakan prosiding bagi pihak defendan kedua untuk kesalahan yang

didakwa dilakukan terhadap syarikat. Oleh itu, permohonan yang dibuat terhadap defendan tidak seharusnya dipenuhi (lihat perenggan 18–20 & 29).

(3) Perintah yang dipohon hanya berkaitan dengan pembayaran wang oleh defendan kedua mengikut arahan defendan pertama. Tuntutan tersebut adalah secara utama berkaitan kewangan dan hanya bertujuan untuk memastikan wang yang akan diterima oleh defendan kedua dari defendan keempat. Dalam keadaan ini, perintah halangan dengan niat untuk menjamin jumlah tersebut tidak dapat diterima oleh mahkamah. Ketidakmampuan defendan bukanlah alasan yang membenarkan perintah yang dipohon. Plaintif tidak menunjukkan bahawa terdapat keadaan luar biasa yang membenarkan perintah yang dipohon walaupun ganti rugi adalah mencukupi (lihat perenggan 30–32, 34 & 36).]

Cases referred to

Ann Joo Steel Bhd v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal [2020] 1 MLJ 689, FC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Durnont Enterprises Ltd v Fazita Investment Ltd and others [2024] EWCA Civ 299, CA (refd)

Ganesh Paulraj v A & T Offshore Pte Ltd and another [2019] SGHC 180, HC (refd)

Isaacs v Robertson [1984] 3 All ER 140, PC (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193; [1995] 1 CLJ 293, CA (refd)

Kwek Seow Kee & Anor v KT Packaging Sdn Bhd (No 2) [1998] MLJU 77; [1998] 3 CLJ Supp 244, HC (refd)

Low Cheng Teik & Ors v Low Ean Nee [2024] 5 MLJ 580, FC (refd)

Mak Siew Wei v Yeoh Eng Kong and other appeals [2018] MLJU 1770; [2019] 7 CLJ 470, CA (refd)

Milaha Explorer Pte Ltd v Pengrui Leasing (Tianjin) Co Ltd [2023] SGCA 6, CA (refd)

Perak Hydro Renewable Energy Corp Sdn Bhd & Anor v Wak Ngah Pili a/p Bah Adim (suing on behalf of herself and 22 individuals from the Senai tribe, as listed in 'Appendix A') [2022] 6 MLJ 698; [2022] 10 CLJ 540, CA (refd)

Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor [2003] 3 MLJ 522; [2003] 3 CLJ 339, CA (refd)

Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 3 MLJ 325; [2005] 2 CLJ 122, CA (refd)

SCF Finance Co Ltd v Masri and another [1985] 2 All ER 747, CA (refd)

Tenaga Nasional Bhd v Bandar Nusajaya Development Sdn Bhd [2017] 1 MLJ 689, FC (refd)

Legislation referred to

Companies Act 2016 ss 345, 347, 347(3), 348, 350
Companies Act 1967 [SG] s 216A

Kriishand G Krishnan (with Maria Faustina) (Kriishand G) for the plaintiff.
Lau Kee Sern (with Vynny Wong and Nur Ashira bt Said Udin) (Kee Sern, Siu & Huey) for the first defendant.
Brian Foong Mun Loong (with Herman Goh Hong Mun) (Cheang & Ariff) for the second defendant.
Chuah Chern Tee (with Steven Tan Chee Qian) (Chuah Qian & Partners) for the third and fourth defendants.

Mohd Arief Emran J:

INTRODUCTION

Interim orders sought by the plaintiff

[1] The plaintiff seeks the following interlocutory injunction against the defendants:

(a) an interim preservation order be granted against the third defendant and/or the fourth defendant to be suspended from issuing and/or releasing payment to the second defendant, as stipulated in the judicial management statement of proposal approved at a creditors' meeting held on 14 February 2022, vide the High Court of Shah Alam, Originating Summons No BA-28JM-24–10 of 2021, pending the full and final disposal of this action;

(b) an interim preservation order be granted against the third defendant and/or the fourth defendant to take all necessary actions to prevent any payment from being released and/or disbursed to the second defendant and/or Messrs Keh Yen, Ng & Partners as a stakeholder, including the cancellation of all unpresented post-dated cheques issued by the fourth defendant to the second defendant pending the full and final disposal of this action; and

(c) an interim preservation order be granted against the first and second defendant to deposit the sum of RM674,739.76 to a joint stakeholder account to be held by the solicitors for the plaintiff, solicitors for the first defendant and/or solicitors for the second defendant, being the excess fund of the second defendant that have supposedly not been used, pending the full and final disposal of this action.

Cause of action against the defendants

[2] The plaintiff claims that the shares registered in the name of the first defendant in the second defendant are shares held on trust and are beneficially owned by him. This is denied by the first defendant.

[3] The first defendant is the registered shareholder of all of the shares held in the second defendant and is currently its sole director. She is also the executor of the estate of the late mother of the plaintiff and the first defendant.

[4] The plaintiff alleges that he had caused the sum of SGD33,362,650 to the second defendant. This was allegedly then paid as a loan to the fourth defendant.

[5] The third defendant was appointed as the sole agent to control the accounts of the fourth defendant pursuant to an order of court pertaining to a judicial management order of the High Court of Malaya at Shah Alam bearing number BA-28JM-24–10 of 2021. The fourth defendant was placed under judicial management in the same proceedings as seen in the order dated 16 December 2021.

[6] On 31 October 2022, the High Court had in the same proceedings referred to earlier, pronounced the following material orders:

(1) That payments received as a result of the approved Statement of Proposal by the Judicial Manager dated 14 February 2022 into RHB Bank Berhad Account No. 2140990075760 [hereinafter referred to as the said account] held by LEADMONT DEVELOPMENT SDN BHD [IN JUDICIAL MANAGEMENT] [hereinafter referred to as the Applicant] shall be used solely to pay the creditors of the Applicant for the period of five (5) years starting from 8.12.2022 to 8.7.2027 [hereinafter referred to as the said period of time for the payments] only as stated and contained in the approved Statement of Proposal by the Judicial Manager dated 14 February 2022 which had been approved by the creditors of the Applicant;

(2) That any parties be it an individual, company or a financial institution and/or any third parties shall not be allowed to garnish any payments from the said accounts or claim for any payments in the said accounts and/or make any preventive or injunction orders to prevent payments to be made to the creditors of the Applicant during the said period of time for the payments;

(3) That the agent appointed by the Judicial Manager after the completion of the Judicial Manager's tenure shall be authorised to solely make the payments to the creditors as stated and contained in the approved Statement of Proposal by the Judicial Manager dated 14 February 2022 for the said period of time for the payments without any obstacles and restrictions;

(4) That the said order shall be enforceable for the said period of time for the payments and the order shall be served on RHB Bank Berhad having its address at 17-G & 17-1, The Boulevard, Mid Valley City, Lingkaran Syed Putra, 59200 Kuala Lumpur within seven (7) days from the date of this order to give full effect of this Order; and (5) The costs of this application be borne by the Applicant.

[7] On 9 May 2023, the third defendant's appointment as the sole authorized agent of the fourth defendant's account was reaffirmed through a court order. Pursuant to this court order, the third defendant is the sole signatory of the fourth defendant's account with RHB Bank until all duties and obligations are fully discharged upon completion of the periodic payments to the approved creditors.

[8] The plaintiff contends that the first defendant had caused the monies held by the second defendant to be utilised for unauthorized purposes and that as a result, the first defendant did breach her duties owed to him and to the second defendant as the sole director of the said company. The plaintiff contends that the assets of the second defendant and the proceeds of the receipts of monies from the fourth defendant were utilised by the first defendant for unauthorized purposes including to preserve and to protect their late mother's estate.

[9] The reliefs sought by the plaintiff against the first defendant relate to the affairs of the second defendant. He seeks that all monies utilised by her be returned to the company.

APPLICABLE LAW FOR AN INTERLOCUTORY INJUNCTION

[10] The applicable principle in whether or not a court should grant an interlocutory injunction as prayed for by the plaintiff is trite. I refer to *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293 where Gopal Sri Ram JCA (as he then was) held:

> To summarise, a judge hearing an application for interlocutory injunction should undertake an inquiry along the following lines:
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> first, he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that

there are serious questions to be tried, he should move on to the next step of his inquiry;

second, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see: *Cheng Hang Guan v Perumahan Farlim (Penang) Sdn Bhd* [1988] 3 MLJ 90; [1988] 1 CLJ Rep 435). Apart from such cases, the judge is entitled to take into account the plaintiffs ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee;

thirdly, the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiffs equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

[11] I also refer to the decision of Kamaludin Md Said JCA in *Perak Hydro Renewable Energy Corp Sdn Bhd & Anor v Wak Ngah Pili a/p Bah Adim (suing on behalf of herself and 22 individuals from the Senai tribe, as listed in 'Appendix A')* [2022] 6 MLJ 698; [2022] 10 CLJ 540:

DAMAGES IS AN ADEQUATE REMEDY

[60] It was also held in *Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah & Ors* that the judge would be entitled to take into account all discretionary considerations, such as any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial.

[61] It is the defendants' submission that damages will be an adequate remedy to the plaintiffs should the court refused to grant the interlocutory injunction sought by the plaintiffs.

[62] The defendants submitted that despite praying for a declaration against the defendants, the plaintiffs have also prayed for damages in the amended statement of claim. This can be seen in para 61(n) of the amended statement of claim where the plaintiffs' prayed for the defendants to pay damages to the plaintiffs for trespass and damages be assessed by the court. We are aware the damages are for the trespass to lands if the plaintiffs succeed in their claim.

[63] Be that as it may, the prayer indicates that damages are an adequate remedy in the circumstances. Therefore, the basis for exercising the court's equitable jurisdiction does not arise in this action. *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408; [1990] 2 CLJ 157; [1990] 1 CLJ Rep 30 is a case where an injunction was not granted by the court on the basis that the damages would be an adequate remedy. Hashim Yeop Sani CJ held as follows:

> But it would seem quite clear that the most important factor to consider as a matter of principle is the question of whether in lieu of the injunction damages would be an adequate and proper remedy because in the matter of injunctions and exercising its jurisdiction the Court acts upon the principle of preventing irreparable damage. As Lindley LJ said in *London & Blackwell Rly C v Cross* [1986] 31 Ch D 354 at p 369:
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> > The very first principle of injunction law is that you do not obtain injunctions for actionable wrongs for which damages are the proper remedy.
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> > ... Therefore, the injunction was in our view not properly granted. In a case like this, it would be more appropriate to order an early hearing of the application to strike out the counter claim and the application for summary judgment rather than to grant the injunction.

[64] The High Court in *Kawood Sdn Bhd v HSBC Bank Malaysia Bhd & Ors* [2001] MLJU 650; [2001] 8 CLJ 363, held that in the statement of claim, the plaintiffs are claiming for damages to be assessed together with interest. By its own admission, the plaintiff acknowledged that damages are an adequate remedy and can be assessed and quantified. As such, the court said that there is no basis to grant the injunction to the plaintiff.

[65] Similarly, in *Kilang Kosfarm Sdn Bhd v Kosma Nusantara Bhd (No 2)* [2002] 5 MLJ 662; [2002] 3 CLJ 165, Ramli Ali J (as he then was) held that the plaintiff have prayed in prayers 3 and 4 of the statement of claim for general and exemplary damages and to ascertain the damages suffered by the plaintiff from the time the plaintiff was expelled from the said estate until the time when vacant possession of the said estate is handed over to the plaintiff as prayed in prayer 2 of the statement of claim. On all those provisions, His Lordship satisfied those damages seem to be a suitable and adequate remedy for the plaintiff.

A [66] In the circumstances of this case and the application for interlocutory injunction, it is our considered view that the damages are an adequate remedy and therefore the court will refuse the grant of the interlocutory injunction sought by the plaintiffs.

B **[12]** I further refer to the decision of the Court of Appeal in *Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 3 MLJ 325; [2005] 2 CLJ 122 where Gopal Sri Ram JCA held:

C That brings us to the second issue, namely, whether an injunction should be granted on the merits of the case before us. Of course, the usual practice of this court once we find that the court below has wrongly rejected an application on jurisdictional grounds is to remit the case to the judge to decide the case on merits. But this is not an ordinary case. Here all the material relevant to the exercise of discretion was before us and the matter is, as we have already said, one of urgency. We therefore considered this to be an appropriate case for us to decide whether the merits justify D the grant of the injunction sought. In our view they do not.

This is a case of a pure breach of contract. Learned counsel for the appellant cited a number of recent cases where equitable estoppel has been elevated to the status of a constructive trust because of some unconscionable behaviour on the part of the E representee. The cases include *Yaxley v Gotts* [2000] 1 All ER 711, *Gillette v Holt* [2000] 2 All ER 289. We may add that useful reference may also be made to *Birmingham Midshire Mortgage Services v Sabherwa*l 80 P & CR 256 where Robert Walker LJ (now Lord Walker) said that in certain situations, for example, a family arrangement, 'the concepts of trust and equitable estoppel are almost interchangeable'. Relying on this line of authority counsel argues that there subsists F a constructive trust in his client's favour because: (i) the respondents made a representation that the canteen contract would be renewed; (ii) the appellant, encouraged by the representation and acting upon it, expended money in refurbishing the premises in question, employing additional staff and purchasing new equipment; (iii) the conduct of the respondents in reneging on their promise G and awarding the canteen contract to the fourth respondent is unconscionable.

Now, if you look at the cases relied on by counsel, you will find that the court in each case imposed a constructive trust to protect a litigant's interest in immovable property. *Here, the appellant has no interest whatsoever in the immovable property in which the canteen is situated. All that the appellant has is a purely contractual right to* H *run the canteen at the respondents' premises: nothing more. And if the appellant establishes a breach of contract at the trial of the action then he will be entitled to an award of damages in the ordinary way. So, all that the appellant complains about is readily compensated by a monetary award. Since monetary compensation is an adequate remedy it follows that in accordance with well settled principles governing equitable* I *discretion, specific relief is inappropriate in the circumstances of this case.*

[13] It is important to note that the plaintiff is not seeking a Mareva order against the defendants. The plaintiff is not attempting to show to this court that the assets of the defendants were being dissipated or there is any real risk

that the said shares will be disposed of to prevent any form of execution of any future judgment against the defendants.

APPLICATION TO THE FACTS OF THIS CASE

This court cannot stay or restrain the order of another High Court

[14] It is clear to this court that the plaintiff is only seeking to stay or restrain the implementation of the order of the High Court that had allowed for the payment of monies from the fourth defendant to all of its creditors including the second defendant.

[15] This court cannot grant the order to restrain such payments as that should only be undertaken before the court that had granted such orders. To allow the prayers sought by the plaintiff against the third and fourth defendants would cause this court to interfere with the exercise of the powers by another High Court judge. I believe that plaintiff should then apply to intervene in those proceedings and seek for a stay of such order directing payment from the fourth defendant to the second defendant.

[16] It is trite law that a court of concurrent jurisdiction cannot interfere with the orders and decisions of another concurrent court. I refer to *Ann Joo Steel Bhd v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal* [2020] 1 MLJ 689, *Tenaga Nasional Bhd v Bandar Nusajaya Development Sdn Bhd* [2017] 1 MLJ 689, *Isaacs v Robertson* [1984] 3 All ER 140, and *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393.

[17] I do note that the above cases relate to an application to set aside a judgment of a concurrent court but the same principle will also apply to the facts of this case. If the plaintiff believes that the orders of the earlier Judge given at the High Court of Malaya in Shah Alam is wrong, then he should then apply to have the said order set aside or appeal against the said order. The attempt to interfere with the implication of the said order cannot be entertained by this court as the said order remains enforceable and should be respected.

The plaintiff does not have direct right to the said monies as the said sums belonged to the second defendant — any wrongdoing must be undertaken through a derivative action

[18] I find that whether the shares in the second defendant belonged to the plaintiff as claimed or otherwise is an issue that will only be determined by this

court after hearing the merits of the claim. The claim over the said shares remains disputed as the first defendant now denies that she is holding the same on trust for the plaintiff.

[19] Despite the above, I find that at best the plaintiff's claim of the alleged wrongs against the first defendant relate to the wrong utilization of the monies received by the second defendant from the fourth defendant.

[20] The plaintiff does not have a direct right to the said monies as the said sums belonged to the second defendant. The alleged wrong utilization of the said sums by the first defendant, at best, points to a possible claim of breach of fiduciary duties owed by the first defendant to the second defendant. The plaintiff does not have a right to institute a claim on behalf of the second defendant unless leave of court is obtained under ss 347 to 350 of the Companies Act 2016. In this case, the plaintiff did not seek leave of court to institute proceedings on behalf of the second defendant for the alleged wrongs committed against the company.

[21] I refer to the judgment of the Federal Court in *Low Cheng Teik & Ors v Low Ean Nee* [2024] 5 MLJ 580 where Nallini Pathmanathan FCJ held:

> [77] The characteristic feature of the derivative action is that there is harm done to the company. Where the majority shareholders fail to rectify the harm inflicted on the company by filing an action for relief in the name of the company, the company's power to enforce its legal rights is delegated to its minority shareholders for the purpose of enforcing the company's rights through a derivative action. In other words, a minority shareholder's right to pursue a derivative action 'derives' from the right vested in the company (see: Dan W Puchniak, Harald Baum and Michael Ewing-Chow, *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge University Press, 2012) at pp 7–8).
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> [78] A derivative action is brought by a minority shareholder for the benefit of the company. Therefore, the outcome of the derivative action will not only affect the minority shareholder but will benefit all the shareholders of the company in the form of increased share value.
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> [85] The existence of the two distinct statutory provisions warrants the conclusion that each section creates a different cause of action. It is self-evident that only the person in whom a cause of action is vested may enforce the relevant claim. If the cause of action is vested in the company, then it is the company itself that should take action. If, on the other hand, it is vested in the shareholder, then he must take action (see: Paul Davies, Sarah Worthington and Chris Hare, *Gower's Principles of Modern Company Law* (11th Ed, Sweet & Maxwell, 2021) at para 14–001).
>
> [86] It is therefore evident that the two types of actions relate to two different causes of action, which are to be employed or applied by the parties in whom such cause of action is vested in order to obtain the requisite remedies provided therein. The Legislature could not have intended for a cause of action vesting in the company to be dealt with by way of an oppression action under s 346 or equally, for a cause of

action vesting in a shareholder to be the subject matter of a statutory derivative action under s 347.

[22] I also refer to Court of Appeal *Mak Siew Wei v Yeoh Eng Kong and other appeals* [2018] MLJU 1770; [2019] 7 CLJ 470 which is summarised as follows:

(a) the loss suffered by a company is separate and distinct from that suffered by a shareholder;

(b) the nature of an action brought by a shareholder for loss suffered personally or qua shareholder, is completely different and distinct from that brought by a shareholder on behalf of the company for losses suffered by the latter; and

(c) any loss suffered by a shareholder in the form of a diminution in the value of the shares or dividends are not to be considered as personal loss; instead, it is a loss reflective of that suffered by the company resulting from a wrongdoing committed against the company. A claim for such loss cannot be brought by way of a shareholder's personal action.

[23] The plaintiff who alleges to be the ultimate owner of the said shares should have sought leave under s 348 of the Companies Act. He is entitled to seek leave as he is a person who claims to have the right to be registered as a member of the company under s 345 of the Companies Act. The wrong done and the losses alleged to have arisen as a result of the alleged wrong utilisation of the monies lies solely with the second defendant. The plaintiff should therefore seek leave before instituting these proceedings for the said losses against the first defendant.

[24] It is clear in paras 54 and 55 of the plaintiff's affidavit in support of the application that the complaint lies with the first defendant's utilization of the second defendant's asset:

> 54. Saya menyatakan bahawa Pembayaran kepada Maybank dan Pembayaran kepada Public Bank tidak dibuat untuk manfaat Defendan Ke-2. Penyelesaian sebahagian daripada kemudahan-kemudahan perbankan tersebut adalah tidak berkaitan dengan urusan atau sebarang kewajipan kewangan Defendan Ke-2. Justeru, adalah tidak wajar untuk menggunakan aset-aset Defendan Ke-2 bagi menyelesaikan isu-isu kewangan harta pusaka mendiang Ibu yang tidak berkaitan sama sekali dengan Defendan Ke-2.
>
> 55. Berhubung dengan Pembayaran kepada Maybank dan Public Bank, saya selanjutnya menyatakan bahawa Defendan Pertama telah menggunakan sebanyak RM4,916,473-27 daripada dana Defendan Ke-2 yang diterima di bawah Penyata Cadangan Pengurusan Kehakiman. Justeru, jumlah sebanyak RM674.739-77 sepatutnya masih berada dalam akaun Defendan Ke-2.

[25] The fact that the plaintiffs claim is actually for the losses allegedly suffered by the second defendant due to the alleged conduct of the first defendant appears in the following paragraphs of the plaintiff's claim in the statement of claims:

> 67. (i) The 1st defendant, as the director of the 2nd defendant, has a duty of fair dealing to ensure that the assets of the 2nd Defendant are used for legitimate business purposes and the benefit of the 2nd Defendant;
>
> (ii) The 1st Defendant, as the director of the 2nd Defendant, has a duty to prevent and/or avoid any conflict of interest, whether actual or perceived, in dealing with the affairs and/or assets of the 2nd Defendant;
>
> (iii) The remittance of the Payment to Maybank using the assets and/or funds of the 2nd Defendant, not for the benefit of the 2nd Defendant, constitutes a breach of the fiduciary duty of the 1st Defendant as the director of the 2nd Defendant;
>
> ...
>
> 68. in the circumstances, the plaintiff pleads that the first Defendant is liable to refund the amount of RM5,591,213.03 to the 2nd Defendant.

[26] Therefore, even if the plaintiff's contention is correct, the above wrong was done to the company. The plaintiff should have then sought leave to seek the right to institute a derivative action against the first defendant on behalf of the second defendant. The said monies belong to the second defendant and the losses, if any, is attributable to the second defendant alone.

[27] I am aware that the company in question is a Singaporean entity. As the claim is filed in Malaysia, the applicable law concerning the right to institute a claim on behalf of the said company must be considered in accordance with the laws of Malaysia and not Singapore. Under such circumstances, the requirement for leave would still be applicable as seen in the decision of the English Court of Appeal in *Durnont Enterprises Ltd v Fazita Investment Ltd and others* [2024] EWCA Civ 299. Therefore, these procedural rules would be applicable in this case and as the plaintiff did not seek leave to institute proceedings on behalf of the company, the case is a non-starter from the outset. More so when our Companies Act has abrogated the common law right as provided under s 347(3) of the Companies Act 2016**.**

[28] Even if this court was to apply Singaporean law to the issue of derivative action, it seems that leave to commence such proceedings must still be obtained under Singaporean law as seen in s 216A of the Companies Act of Singapore. This right exists and extends to those who claim to be beneficial owners of such shares as seen in *Ganesh Paulraj v A & T Offshore Pte Ltd and another* [2019] SGHC 180. Therefore, leave to institute such proceedings is also mandatory under the juridical law of the second defendant.

[29] For the above reason, I believe that this court should not accede to the prayers sought against the defendant. The plaintiff has failed to comply with the statutory requirements laid down under the Companies Act and this must be complied with before any claim could be instituted on behalf of the company.

Damages is adequate and the injunction is only to secure the debt owed by the defendants to the plaintiff

[30] I also find that the orders sought only relate to the payment of monies by the second defendant in accordance with the directions of the first defendant.

[31] The said claim is mainly and primarily monetarily and is only to secure the monies that will be received by the second defendant from the fourth defendant.

[32] In the circumstances, a restraining order with the intention to securitize the said sums cannot be entertained by this court.

[33] I do note that plaintiff implores this court to consider the financial condition of the first and second defendants and their potential inability to pay the said sums claimed back to plaintiff or the second defendant. That does not fall within the scope of an interlocutory injunction as this court cannot securitize the debt claimed by the plaintiff through an O 29 application.

[34] It is trite that impecuniosity of the of the defendants is not grounds justifying the orders sought. This court cannot securitize the amount claimed through an interlocutory injunction. Even a Mareva order does not create any security for any monetary claim. See *SCF Finance Co Ltd v Masri and another* [1985] 2 All ER 747 and *Kwek Seow Kee & Anor v KT Packaging Sdn Bhd (No 2)* [1998] MLJU 77; [1998] 3 CLJ Supp 244.

[35] I further refer to the following excerpts from the judgment of the Singapore Court of Appeal in *Milaha Explorer Pte Ltd v Pengrui Leasing (Tianjin) Co Ltd* [2023] SGCA 6. I am aware that the statements made by Judith Prakash JCA was made by her concerning an application for a Mareva injunction. Nonetheless, I find that this consideration also plays a role in a normal interlocutory restraining order:

> 29 The purpose of a Mareva injunction, we stress, is not to provide security to a litigant or to guard against potential insolvency of the counterparty: see *Lee Shieh-Peen Clement and another v Ho Chin Nguang and others* [2010] 4 SLR 801 ('Lee Shieh-Peen Clement') at [26]; see also *Tribune Investment Trust Inc v Dalzavod Joint Stock Co* [1997] 3 SLR(R) 813 at [14]. Instead, the undoubted object of the

A Mareva injunction is to prevent the course of justice from being frustrated by a defendant's deliberate actions which would have the effect of defeating wholly or in part any judgment or order which the claimant may thereafter obtain against the defendant: see Lee Shieh-Peen Clement at [26] citing *Customs and Excise Commissioners v Barclays Bank pic* [2007] 1 AC 181. The test, as earlier explained, B is still whether there were unjustified dealings with assets or a real risk thereof on Milaha's part.

[36] For the above reasons, I find that plaintiff has not shown to this court that there are exceptional circumstances justifying the said orders sought even C if damages are adequate. I refer to *Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor* [2003] 3 MLJ 522; [2003] 3 CLJ 339 where Gopal Sri Ram JCA held:

It was argued for the respondent that this is a suitable case for specific relief because D the agreement between the first appellant and the second appellant was the product of a conspiracy between them directed at injuring the respondent. Learned counsel for the respondent argued that in consequence of the said conspiracy, the said agreement (for that is what we will call the agreement entered into inter se the appellants) was liable to be set aside by a court. With respect, we do not agree. It is settled law that conspiracy is an actionable tort, the remedy for which is damages. E See *Lonrho Ltd & Anor v Shell Petroleum Co Ltd &Anor (No 2)* [1982] AC 173. The tort has been held to be actionable in our jurisdiction in at least one (1) case. See *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105; [1984] CLJU 153; [1984] 1 LNS 153 per Wan Suleiman FCJ.

Now, it is settled principle that specific relief is generally declined by a Court of F Equity where monetary compensation is an adequate remedy. In the context of the remedy of specific performance, that principle finds statutory expression in s 11(2) of the Specific Relief Act 1950.

Learned counsel for the respondent very frankly concedes that an award of damages is the appropriate remedy in the present case. That being so, discretion should prima G facie be exercised against the respondent in the present instance unless there are very exceptional circumstances taking the case the other way. Having scrutinised the matters before us with care, we came to the conclusion that there are no exceptional circumstances. Accordingly, the present appeals fall within the general principle alluded to a moment ago.

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[37] This court will not make any final determination on the issues of whether the said sums were properly utilised or who owns the shares of the second defendant. Those are issues that will be determined at the end of this suit subject to any interlocutory application filed by the litigants. It is sufficient I at this stage that this court finds that the plaintiff did not fulfil the requirements justifying the interlocutory orders as prayed for in encl 7.

[38] For the above reasons, I dismiss the plaintiffs application in encl 7 with costs of RM15,000 to each set of defendants to be paid forthwith.

Application dismissed.

Reported by Nabilah Syahida Abdullah Salleh